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NO._____

In the

Supreme Court of the United States

October Term, 1997

EUGENE M. HARRINGTON; MARTIN LEVY;
AND THOMAS KLEVEN,
Petitioners

v.

WILLIAM H. HARRIS, ET AL.,
JAMES M. DOUGLAS; CALIPH JOHNSON;
AND TEXAS SOUTHERN UNIVERSITY
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Beatrice Mladenka-Fowler
Counsel of Record
Mladenka-Fowler & Adams
1529 Heights Boulevard
Houston, TX 77008-4218
(713) 862-7349
(713) 862-2979 FAX

J. Patrick Wiseman
Wiseman, Durst,
Tuddenham & Owen
1004 West Avenue
Austin, TX 78701
(512) 479-5017
(512) 479-0409 FAX

Attorneys for Petitioners

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I

QUESTIONS PRESENTED

1. May the State punitively sanction public employees for engaging in speech protected by the First Amendment by discriminating in the salaries these employees are paid?

2. May a public employer deny or reduce otherwise deserved and entitled merit raises in retaliation for public employees' exercise of free speech rights protected by the First Amendment?

3. Is the Court of Appeals' finding that the denial or reduction of earned merit raises in retaliation for public employees' exercise of protected speech is not an actionable First Amendment violation inconsistent with this Court's finding in *Rutan v. Republican Party of Illinois* that denials of promotions, transfers, recalls and hiring in retaliation for the exercise of free speech rights did rise to the level of a Constitutional violation?

II

PARTIES TO THIS PROCEEDING

Plaintiffs in the District Court:

Eugene M. Harrington
Martin Levy
Thomas Kleven

Defendants in the District Court:

James M. Douglas
Caliph Johnson
Texas Southern University
William H. Harris
Bobby Wilson

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Eugene M. Harrington, Martin Levy and Thomas Kleven respectfully request this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the opinion of that Court which was entered on July 21, 1997 in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 118 F.3d 359 (5th Cir. 1997) and is reprinted as Appendix A hereto.

The opinion of the United States Court of Appeals for the Fifth Circuit reported at 108 F.3d 598, which was withdrawn and superseded by the opinion reported at 118 F.3d 359, is reprinted as Appendix B hereto.

The District Court Final Judgment was not reported, but is reprinted as Appendix C hereto.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the petitioners brought this suit in the Southern District of Texas. On March 3, 1995 the Southern District entered judgment in favor of the petitioners.

Respondents appealed, and on March 14, 1997 the Fifth Circuit Court of Appeals entered an opinion reversing the judgment as to the issue of §1983 retaliation under the First Amendment and affirming on the issues of §1981 race discrimination and substantive due process under the Fourteenth Amendment.

Petitioners' Suggestion for Rehearing En Banc was treated as a Petition for Rehearing and the revised opinion was entered on July 21, 1997. The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional amendments and federal statutes are as follows:

UNITED STATES CONSTITUTION

AMENDMENT I - Freedom of Religion, Speech and Press; Peaceful Assemblage: Petition of Grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV - Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

42 U.S.C. § 1983

Civil Action For Deprivation Of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Professors Eugene M. Harrington, Martin Levy and Thomas Kleven, are three white, tenured full professors at a historically Black state supported law school - Thurgood Marshall School of Law at Texas Southern University in Houston, Texas. Professors Harrington, Levy and Kleven complained that they were discriminated against in their salaries and salary increases as compared to their African-American full professor colleagues at Thurgood Marshall School of Law in retaliation for engaging in speech concerning law school governance and accreditation issues, Hispanic representation within the law school student organization, and salary disparities based on race.

The jury found that under Texas Southern University's established merit raise criteria respondent

Douglas awarded Harrington, Levy and Kleven lower merit raises than they were entitled to in retaliation for the exercise of their protected free speech rights. The jury awarded compensatory and punitive damages to petitioners, and the Court entered final judgment on the verdict. Finding the underpayment to be the result of illegal discrimination based on race, retaliation for the exercise of protected speech and the arbitrary and capricious evaluation process, the court also ordered equitable relief for petitioners.

In its initial opinion, subsequently withdrawn, the Court of Appeals assumed that the speech engaged in by the professors was protected speech and that they deserved the merit pay increases which they were denied. Relying on *Dorsett v. Board of Trustees for State Colleges & Universities*, 940 F.2d 121 (5th Cir. 1991)[1], however, the Fifth Circuit decided that the denial of even admittedly deserved merit pay increases will not constitute an adverse employment action for First Amendment purposes. The Court affirmed the jury award of damages in favor of the petitioners for discrimination on the basis of race and the arbitrary and capricious awarding of merit raises, and affirmed the Magistrate Judge's award of equitable relief.

Harrington, Levy and Kleven timely filed a Suggestion for Rehearing En Banc, which was denied but treated as a Petition for Rehearing. On July 21, 1997 the same panel of the Court of Appeals for the Fifth Circuit withdrew its first opinion and entered a revised opinion which again affected only the First Amendment claim.

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[1] At least one district court in the Fifth Circuit has correctly read *Dorsett* as holding that a claim for retaliation of the First Amendment may be supported by any adverse employment action as to which any important condition of employment may qualify. *Wagner v. Texas A&M University*, 939 F. Supp. 1297 (S.D. Tex. 1996). The *Wagner* court correctly read *Dorsett* as determining that there was no protected speech involved in the case. *Id.* at 1313.

In its revised opinion from which this appeal arises the Court of Appeals again presumed that the petitioners' speech involved matters of public concern, and further assumed that the petitioners did indeed qualify for merit pay increases. However, continuing to rely upon its own earlier extension of *Dorsett,* the Court again held that the petitioners do not have an actionable First Amendment claim for the denial of otherwise entitled merit raises. This was so, the panel argued, because the petitioners have received some merit enhancement, even though (1) the raises were less than those awarded to colleagues who were not being sanctioned for free speech activities, and (2) the jury found by a preponderance of the evidence that petitioners were refused full merit raises based upon protected free speech. *Harrington v. Harris,* 118 F.3d 359, 366 (5th Cir. 1997).

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's Opinion Conflicts With This Court's Holding In *Rutan v. Republican Party of Illinois* And Is Inconsistent With Other Supreme Court Cases.

The Court of Appeals did not disturb the jury's finding that the reason petitioners received lower merit pay raises than their peers was Douglas' retaliation against them for the exercise of their First Amendment rights. Indeed, in upholding the jury's finding of liability in petitioners' substantive due process claim, the Court held that "a jury could reasonably conclude that Johnson and Douglas acted in an arbitrary and capricious manner in their merit pay evaluations." 118 F.3d 359, 368. Since the factual evidence before the jury in regard to petitioners' due process claim was identical to the evidence before it in regard to their

First Amendment claim, the record supports the jury finding that respondent Douglas acted arbitrarily in retaliation against Professors Harrington, Levy and Kleven for the exercise of their First Amendment rights.

Thus the Court of Appeals' characterization of this case as involving "nothing more than a dispute over the quantum of pay increases" (*Id.* at 366) is erroneous. Rather, the issue in this case is whether an actionable First Amendment claim has been presented when the evidence shows that a public employer has denied or reduced deserved merit raises to public employees in retaliation for the exercise of their First Amendment rights.

This Court has always recognized the free speech guarantee of the First Amendment as among the most important of our constitutional protections and has always treated freedom of speech as a preferred right:

> When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, ... we remain mindful of the fact that the latter occupy a preferred position....[T]he right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men'.

Marsh v. Alabama, 326 U.S. 501, 509 (1946).

Speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *Connick v. Meyers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1689 (1983). See also *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, ___U.S.___,

115 S.Ct. 2510, (1995) (the exercise of free speech as a substantive constitutional right is afforded a "presumption of constitutionality").[2]

The Supreme Court has never required an economic harshness test for claims brought under the First Amendment. To the contrary, the concept that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"[3] is premised on the belief by the members of the Continental Congress that "the unfettered interchange of ideas"[4] forms the very basis of a free society.

Moreover, damages have long been presumed for deprivation of constitutional rights, no matter how nominal. See *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 1053-54 (1978).

In the employment context the Supreme Court has clearly and consistently stated that a government employer may not deny employees the benefits of employment so as to infringe their First Amendment rights:

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a

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[2] Speech protected by the First Amendment is given preferred status so that discrimination against speech is presumed to be unconstitutional. *Id.* at p. 2516.

[3] *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 2545 (1989).

[4] *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1308 (1957).

> person on a basis that infringes his constitutionally protected interests - ***especially, his interest in freedom of speech.*** For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 [(1958)]. Such interference with constitutional rights is impermissible.

Perry v. Sinderman, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697 (1972)(emphasis added).[5]

More recently, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 75, 110 S.Ct. 2729, 2737 (1990), this Court held that an employee need not have been dismissed, nor have suffered the "substantial equivalent of a dismissal" to have an actionable First Amendment claim. In *Rutan* the Court considered whether denials of promotions, transfers, recalls or hiring decisions involving low-level public employees may constitutionally be based on party affiliation and support. The Court found explicitly that the employer actions complained of were punitive, adversely affected the terms of employment, and chilled the exercise of protected belief and association by public employees:

> Employees who find themselves in dead-end positions due to their political backgrounds

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[5] *See also* 92 S.Ct. at 2697 for a collection of cases in which this principle has been applied in the employment context.

> *are* adversely affected [in the terms of their employment].

Rutan, 497 U.S. at 73, 110 S.Ct. at 2736 (emphasis in original).

> Employees who do not compromise their beliefs stand to lose the considerable **increases in pay** and job satisfaction attendant to promotions,... These are significant penalties and are imposed for the exercise of rights guaranteed by the First Amendment.

Id., 497 U.S. at 74, 110 S.Ct. at 2736 (emphasis added).

In rejecting the Seventh Circuit's "substantial equivalent of a dismissal rule" as "unduly restrictive because it fails to recognize that there are deprivations less harsh than dismissal that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy" (*Id.*, 497 U.S. at 75, 110 S.Ct. at 2737), this Court also confirmed that the First Amendment protects state employees not only from dismissals but also from ***"even an act of retaliation as trivial as failing to hold a birthday party for a public employee...when intended to punish her for exercising her free speech rights."*** *Rutan*, 497 U.S. at 75-76, n. 8, 110 S.Ct. at 2737-2738, quoting the Circuit Court opinion at 868 F.2d 943, 954, n. 4 (7th Cir. 1989) (emphasis added).

By holding that the denial or reduction of earned merit raises is not actionable, the Fifth Circuit is in direct conflict with the clear import of *Rutan* that the denial of **any** benefit in retaliation for protected speech is an adverse

employment action and is an actionable First Amendment violation.

II.

The Fifth Circuit's Opinion Directly Conflicts With The Fourth Circuit's Decision In *Kim v. Coppin State College* And Conflicts In Principle With Other Circuit Court Decisions.

1. Denials Of Raises Are Actionable In The Fourth Circuit.

The Fourth Circuit has expressly held that the denial of a pay increase for reasons of engaging in protected speech is an actionable adverse employment action. *Kim v. Coppin State College*, 662 F.2d 1055, 1062 (4th Cir. 1981).

In *Kim v. Coppin State College* the plaintiffs alleged that they were denied pay increases for participating in a student boycott. The Fourth Circuit reversed the district court's directed verdict for a determination of whether the speech engaged in by the professors was protected and a substantial factor in the employer's adverse action of denying pay increases, stating that such a denial would entitle the plaintiffs to relief "...for the college's unconstitutional infringement of their rights to free expression." 662 F.2d at 1062.

2. The Fifth Circuit Opinion Conflicts In Principle With Other Circuits.

The general principle in most circuits is that First Amendment claims are to be judged "not in the harshness of the sanctions applied, but in the imposition of any disciplinary action for the exercise of permissible free speech." *Bennis v. Gable*, 823 F.2d 723, 731 (3rd Cir.

1987). The Second Circuit has held that a public college's creation of a "shadow class" and encouragement of the continued erosion in the size of a professor's class in retaliation for his protected speech was "the antithesis of freedom of expression." *Levin v. Harleston,* 966 F.2d 85 (2nd Cir. 1992). In *Waters v. Chaffin*, the Eleventh Circuit has stated that "the First Amendment is implicated whenever a government employee is disciplined for his speech." 685 F.2d 833, 837 n. 9 (11th Cir. 1982). The Seventh Circuit has held in *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187 (7th Cir. 1995) that retaliation need not be monstrous to be actionable under the First Amendment; it need merely create the potential for chilling employee speech on matters of public concern.

Many circuits, including the Fifth Circuit, have held that employment decisions such as transfers without reduction in pay may constitute violations of First Amendment rights. See, for example, *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114 (1st Cir. 1977) (transfer of social worker without demotion or cut in pay was actionable because it was solely in retaliation for Rosado's speech); *Bernheim v. Litt,* 79 F.3d 318 (2nd Cir. 1996) (teacher's retaliatory reassignment to classroom position resulting in damage to her reputation, opportunities for advancement and earning potential stated legally cognizable harm under the First Amendment); *Robb v. City of Philadelphia*, 733 F.2d 286 (3rd Cir. 1984) (transfer and denial of promotion were "benefit" which could not be denied in retaliation for exercise of First Amendment rights); *Boring v. The Buncombe County Board of Education,* 98 F.3d 1474 (4th Cir. 1996) (transfer with no decrease in pay or benefits provided adequate basis for First Amendment claim); *Fyfe v. Curlee,* 902 F.2d 401 (5th Cir. 1990) *cert. denied* 498 U.S. 940, 111 S.Ct. 346 (1990) (secretary's transfer to less responsible job at same wage in retaliation for sending

daughter to private school violated First Amendment and secretary was entitled to at least nominal damages); *Click v. Copeland,* 970 F.2d 106 (5th Cir. 1992) (transfer of deputies to less desirable jail positions constituted First Amendment retaliation for protected political activities); *Forsyth v. City of Dallas, Tx.*, 91 F.3d 769 (5th Cir. 1996) (transfer from prestigious intelligence unit to night patrol constituted adverse action in retaliation for reporting illegal wiretapping); *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978) *cert. denied* 443 U.S. 911 (transfer to jail and lowered evaluations in retaliation for discussing pending civil rights litigation was actionable under First Amendment); and *McCabe v. Sharrett,* 12 F.3d 1558 (11th Cir. 1994) (transfer to another position with frozen salary because of marriage to a colleague constituted adverse action in violation of First Amendment). Each of these holdings supports a finding that a denial or reduction of an earned merit raise in retaliation for a protected First Amendment right is actionable.

III.

The Fifth Circuit's Opinion Condones Salary Discrimination In Retaliation For The Exercise Of Protected Speech.

The Fifth Circuit assumed that petitioners' speech was protected and that they "actually deserved the merit pay increases of which they complained." *Harrington v. Harris,* 118 F.3d 359, 366 (5th Cir. 1997). In light of the fact that the jury and the trial court found that respondent Douglas had denied petitioners deserved merit increases in retaliation for their exercise of First Amendment rights, the court's finding that "the variations in the amounts or percentages of merit pay increases...actually awarded were not significant" (*Id.*) is no different than the panel's original opinion that the

denial of a deserved merit raise in retaliation for protected speech is not an actionable adverse employment action.

Such a holding, if allowed to stand, would severely undercut the free speech rights of all public employees. Public employers who disapprove of their employees' protected speech could with impunity deny or reduce salary increases for the rest of such employees' careers, leaving the speakers far behind other employees in salary and benefits tied to salaries.[6] Employers could even let it be known that employees who dare to speak out will receive no more salary increases. Such a chilling effect on free speech is untenable.

The Fifth Circuit assumes that a threat of discharge, a demotion, a denial of a promotion or a reduction in pay would each constitute an adverse action. 118 F.3d 359, 366. Public employees rely on the prospect of deserved merit increases every bit as much as on their present salary levels. Likewise, in terms of job satisfaction and employee morale, the distinction between a denial of an increase and a reduction in pay is elusive. As a practical matter, therefore, the chilling effect on speech of the denial of a deserved merit raise is identical to the chilling effect on speech of a reduction in pay.

In addition, if, as the panel states, "reprimands" are adverse employment actions (*Id.* at 365), then the denial of a deserved merit raise in retaliation for protected speech must likewise be actionable, since the withholding of money is likely to have a far greater chilling effect on protected speech than a mere reprimand. There is little difference, as

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[6] In the instant case, the petitioners' salaries at the time of trial were approximately $3,500 to $5,000 per year lower than their comparable colleagues' salaries. T. 11, p. 205.

well, between denial of a promotion and denial of a merit increase.[7] Generally, the reason employees seek promotions is for the accompanying additional pay, a point expressly noted by the Supreme Court in *Rutan, supra.*

As also noted in *Rutan*, it is not necessary that the employment decision be the substantial equivalent of a dismissal. Nevertheless, the denial of deserved merit raises in retaliation for protected speech amounts to such an equivalency. No employee could afford to remain on a job without deserved raises while one's colleagues continue receiving such increases year after year. There would be no choice but to resign and seek employment elsewhere.

Indeed, in the Court of Appeal's revised opinion, the panel apparently concedes that the total denial of merit raises in retaliation for the exercise of First Amendment rights would be actionable:

> If Plaintiffs had received no merit pay increase at all or if the amount of such increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion.

Harrington v. Harris, supra, 118 F.3d at 366.

To justify its ruling in this case, however, the Fifth Circuit finds that "the variations in the amounts or percentages of merit pay increases which [Douglas] actually awarded were not significant." *Id.*

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[7] See *Bickel v. Burkhart*, 632 F.2d 1251 (5th Cir. 1980) (denial of promotion affects an important condition of employment).

It is not correct to say that the merit raise variations in this case "were not significant." The jury found that as a result of respondent Douglas' retaliation against them, petitioners were damaged in lost pay over a four year period in the following amounts: Harrington - $11,263; Levy - $17,521; Kleven - $20,416. Lost wages averaging between $2,500 and $5,000 a year are most certainly significant and are enough to chill the speech of even the most hardy employees.

Nor does the matter end here. For if an employer can escape liability for retaliatory action by awarding disfavored employees significantly lower merit raises than their peers on the basis of the exercise of their protected rights, then that practice could continue year after year, without halt. This would have the cumulative effect over a period of years of a steadily increasing salary differential. This is, in fact, what happened in the instant case.

IV.

The Fifth Circuit's Opinion Conflicts With This Court's And Other Circuit Courts' Findings In Regard To "Nominal Damages."

It is incorrect to state that even relatively small merit pay deprivations in retaliation for the exercise of free speech rights forecloses a First Amendment claim. The First Amendment is too important to allow public employers to escape liability by arguing that the amount of money involved is insignificant. That would enable employers to push the envelope to the limit, and would involve courts in time-consuming and hard-to-resolve factual disputes over what is or is not a significant dollar amount while the far more significant matter of stopping employers from engaging in such retaliatory action would fade into the

background. Moreover, even relatively small differences in pay and merit raises impact employees' reputations and careers, and can therefore chill free speech when the differences are retaliatory, because employees tend to judge their own and their colleagues' competence based on those differentials.

Thus, even if the denial of merit pay was not "significant", the violation of the constitutional right to freedom of speech warrants an award of nominal damages.

> "In an action brought pursuant to Section 1983, 'even when a litigant fails to prove actual compensable injury, he is entitled to an award of nominal damages upon proof of violation of a substantive constitutional right.'" *Gibeau v. Nellis,* 18 F.3d 107, 110 (2d Cir. 1994) (quoting *Smith v. Coughlin*, 748 F.2d 783, 789 (2d Cir. 1984), which cites *Carey v. Piphus,* 435 U.S. 247, 267, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978)). Such an award "is not discretionary where a substantive constitutional right has been violated..." *Gibeau, supra,* 18 F.3d at 110-11.

Bernheim v. Litt, 79 F.3d 318, 326 (2nd Cir. 1996). See also *Fyfe v. Curlee,* 902 F.2d 401, 406 (5th Cir. 1990) *cert. denied* 498 U.S. 940, 111 S.Ct. 346 (1990) (public school secretary whose constitutional rights were violated through her transfer due to her decision to send her daughter to private, all-white school was at least entitled to nominal damages of $1), citing *Memphis Community School District v. Stachura,* 477 U.S. 299, 308 n. 11, 106 S.Ct. 2537, 2543, n. 11, 91 L.Ed.2d 249 (1986); *Carey v. Piphus,*

supra, and *Familias Unidas v. Briscoe,* 619 F.2d 391, 402 (5th Cir. 1980).

The jury and the trial judge in the cause *sub judice* found that the respondents denied the petitioners fair treatment in salaries in retaliation for their protected speech. The Fifth Circuit made no finding to the contrary, and in fact, affirmed the substantive due process claim for denial of merit raises which was premised upon Douglas' retaliatory treatment toward petitioners. At a minimum, had the petitioners been unable to prove compensatory damages, they would have been entitled to nominal damages for the violation of their First Amendment right to freedom of speech.

V.

The Fifth Circuit's Opinion Conflicts With Analogous Title VII Holdings.

The Fifth Circuit has recently reiterated the long-held view that "matters of compensation" in employment may constitute adverse employment actions in the realm of Title VII causes of action. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997). See also *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242 (1981), in which this Court confirmed that a plaintiff may bring a claim for "discriminatory undercompensation" under Title VII. By holding that the denial or reduction of merit raises does not constitute an adverse action for First Amendment purposes, the Fifth Circuit is placing the important constitutional rights of petitioners below employees' statutory rights under Tittle VII. Given the preferred status of the First Amendment this country and this Court has always maintained, this result is unsupportable. *Marsh v. Alabama, supra.*

CONCLUSION

In withdrawing its initial opinion the Court of Appeals recognized the untenability of its holding that the denial or reduction of deserved merit raises in retaliation for the exercise of free speech rights is not actionable. The Court's attempt in its revised opinion to salvage its reversal of the trial court's judgment by distinguishing between the significance of the amount of the retaliatory denials or reductions of deserved merit raises is equally untenable if the fundamental right of free speech is to receive the protection it deserves. This Court and other federal courts have consistently recognized retaliation regarding compensation as an actionable First Amendment violation. Salary discrimination is a classic example of a cognizable injury in other contexts, such as race or gender discrimination, and the First Amendment demands, at a minimum, no less protection.

For these various reasons, this petition for certiorari should be granted. If the petitioners are correct that the denial or reduction of merit raises constitutes a cognizable harm under the First Amendment, the Fifth Circuit should be reversed and the judgment rendered in favor of petitioners.

Respectfully submitted,

Beatrice Mladenka-Fowler
Counsel of Record
MLADENKA-FOWLER & ADAMS
1529 Heights Boulevard
Houston, Texas 77009

(713) 862-7349
FAX (713) -862-2979

J. Patrick Wiseman
WISEMAN, DURST,
TUDDENHAM & OWEN
1004 West Avenue
Austin, TX 78701
(713) 479-5017
FAX (713) 479-0409

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I certify that the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT has been served on the respondents by mailing it First Class U.S. Mail on the ____ day of _____, 1997 to: Mr. Renaldo Stowers, Assistant Attorney General, P.O. 12548, Austin, TX 78711-2548

_____

Beatrice Mladenka-Fowler
Counsel of Record
MLADENKA-FOWLER & ADAMS
1529 Heights Boulevard
Houston, Texas 77009
(713) 862-7349
FAX (713) -862-2979

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-20751

EUGENE M. HARRINGTON; MARTIN LEVY;
THOMAS KLEVEN,

Plaintiffs-Appellees,

VERSUS

WILLIAM H. HARRIS, ET AL.,

Defendants,

JAMES M. DOUGLAS; CALIPH JOHNSON;
TEXAS SOUTHERN UNIVERSITY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

REVISED OPINION

Before REYNALDO G. GARZA, DeMOSS, and PARKER, Circuit Judges.

DeMOSS, Circuit Judge:

The opinion issued in this case under date of March 14, 1997, is withdrawn and the following is issued in place thereof.

In this proceeding tried by consent before a magistrate judge, the jury found that three white law school professors, Plaintiffs Eugene M. Harrington, Martin Levy, and Thomas Kleven, of state-supported Texas Southern University's Thurgood Marshall School of Law in Houston, Texas, had been discriminated against by the law school's dean, Defendant James M. Douglas, on the basis of protected speech, and by the school's associate dean, Defendant Caliph Johnson, on the basis of their race. The jury also found that Defendants Douglas and Johnson violated Plaintiffs' substantive due process rights. The jury awarded compensatory and punitive damages and judgment was entered. Holding that judgment as a matter of law should have been entered against Plaintiffs' as to their claims under § 1983 for First Amendment free speech retaliation, we reverse as to that issue, but affirm as to the issues of § 1981 race discrimination and Fourteenth Amendment substantive due process.

BACKGROUND

Appellees/Plaintiffs Eugene M. Harrington ("Harrington"), Martin Levy ("Levy"), and Thomas Kleven ("Kleven") are tenured faculty members of the Texas Southern University Thurgood Marshall School of Law ("the law school") in Houston, Texas. They have been on the law school's faculty since 1966, 1972, and 1974,

respectively. The parties do not dispute that the law school is a public university with a historically black majority enrollment.

In 1981, Appellant/Defendant James Douglas ("Douglas") was named dean of the law school. Appellant/Defendant Caliph Johnson ("Johnson") had been on the law school faculty since 1975 and served as associate dean from 1990 to 1992.

During Douglas' first semester as dean, Harrington and Levy approached Douglas concerning a Student Bar Association ("SBA") recommendation to appoint only black students to representative positions on various law school committees. Harrington and Levy believed that non-black student representation was important and they solicited Douglas to disregard the SBA recommendation and appoint non-black students.[1] It is unclear how Douglas reacted to their suggestions. Ultimately, the university president and a Texas state senator became involved and non-black students were subsequently appointed to the committees. Levy claims that the following year he received the lowest salary recommendation of any member on the faculty.

In May 1983, thirteen law school professors, including Levy and Kleven, signed a document entitled, "Bill of Particulars." In this document, the signatories complained that Dean Douglas discriminated against certain professors as to salaries, that he failed to adhere to law school policies, and that he mishandled various administrative duties. The Bill of Particulars addressed:

> the professors' concerns regarding American Bar Association (ABA) mandates, extreme insensitivity to the role of the Chicano students in the Law School, unilateral reduction of courses resulting in

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[1] The law school constitution allowed the Dean to appoint faculty representatives to the law school committees. Student representatives were chosen by the SBA.

> harm to students, reversing a long-standing policy on Senior Priority exams, unilateral increase in enrollment at the Law School, and such administrative matters as jeopardizing the status of the Law School by failing to develop a plan for the clinical program, and failing to properly certify Law School graduates for the July 1982 Bar exam.

This Bill of Particulars also addressed the signatories' concern that certain professors had received arbitrary or unfair performance evaluations or salary increases. Appellee Harrington did not sign this document.

One month later, another letter was sent to Douglas, further detailing the professors' concerns. Douglas sent no written response. In July 1983, eight faculty members, including Levy and Kleven, wrote to the university's Vice-President for Academic Affairs requesting that the university dismiss Douglas as dean of the law school. Harrington did not sign this letter.

In early 1984, eighteen of the twenty-three full-time members of the law school faculty, including Harrington, Levy, and Kleven, participated in a vote of "confidence/no confidence" concerning Douglas. Twelve members of the faculty voted "no confidence" and six members abstained.

Approximately six months later, fifteen members of the law school faculty, including all three Plaintiffs, wrote a letter to the president of the university requesting that Douglas be removed as dean. The university president denied their request.

Several months later, eight members of the law school faculty wrote a letter to the President of the American Bar Association complaining that the university's refusal to remove Douglas violated ABA guidelines. Following an investigation, the ABA dismissed the complaint.

Beginning in 1985, Levy and Kleven, along with several of their black colleagues, complained to both the university president and vice-president about discriminatory treatment in their salaries. In 1986, then vice-president William Moore allegedly made salary adjustments for some of the professors, including Levy and Kleven; however, Plaintiffs contend that they never received these salary increases.

In 1988-89, Levy and Kleven again complained to the university vice-president about unfair treatment in salaries and raises, and were subsequently "awarded a partial adjustment for that year."

In 1990, Levy and Kleven complained to then university vice-president Bobby Wilson about Dean Douglas' unfair treatment regarding their salaries and raises. Levy subsequently received a salary adjustment.

Later in 1990, vice-president Wilson developed a comprehensive merit evaluation system.[2] The merit evaluation system required the individual faculty members to evaluate themselves on a point basis, and then submit their self-evaluations to another appointed faculty member for further review. Johnson, as associate dean of the law school, was chosen to assess law school faculty's self-evaluations and recommend overall point totals to the dean. The merit evaluations performed by Johnson formed the basis for the salary increases to be awarded by Dean Douglas.

Plaintiffs state that Johnson failed to notify Harrington about the newly implemented self-evaluation form, even though Johnson allegedly knew that Harrington was on sabbatical when the form was adopted. Harrington never submitted a self-evaluation form for the 1990-91 academic year. His failure to do so was considered when salary increase determinations were made.

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[2] Prior to the implementation of this system, the university did not have a uniform faculty evaluation system.

Plaintiffs state that, for the 1990-91 academic year, "Johnson also lowered the points requested for all the white professors...and raised the points requested for every Black professor who used the identical form."

In 1991-92, Harrington was awarded "professor of the year" by all three student bar associations on campus. This same year, Harrington was allegedly awarded the lowest percentage salary increase of all full professors - 1%.

In 1991-92, Kleven received the "outstanding teacher of the year award" from Texas Southern University and was asked to be a speaker at the law school graduation. This same year, Johnson allegedly lowered Kleven's self-evaluation points because of insufficient scholarship. Johnson, however, admitted to never having read the scholarly work of Kleven.

Plaintiffs alleged that, by 1993, the disparity in salaries between the average white full professors and average African American full professors had grown to approximately $3,000 per year even though, on average, the white professors had allegedly eight years more longevity than the African American professors. Plaintiffs allege that Harrington, who had been a professor longer than any other, was ranked seventh in salary; Levy, who ranked third in years, ranked ninth in salary; and Kleven, who tied Dean Douglas in years as a professor, ranked tenth in salary.

At the time of trial, Harrington's nine month salary was $102,046, Levy's nine month salary was $98,297, and Kleven's nine month salary was $97,332. Harrington, Levy, and Kleven were among the ten highest paid faculty at the law school.

After filing a complaint with the Equal Employment Opportunity Commission in 1993, Plaintiffs brought suit in federal court alleging violations of their due process rights under the Fifth and Fourteenth Amendments to the Constitution; violations of their civil rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983; conspiracy to interfere with their civil rights under the Klu Klux Klan Act,

42 U.S.C. § 1985; racial discrimination in violation of equal protection under the Civil Rights Act of 1966, 42 U.S.C. § 1981; and violation of their right to free expression under the First, Fifth, and Fourteenth Amendments to the Constitution, as well as pendent state claims for breach of contract and intentional infliction of emotional distress.

At trial, the following issues were submitted to the jury: a § 1983 claim for retaliation in violation of Plaintiffs' right to free expression under the First Amendment; claims under § 1981 and Title VII for race discrimination; and a claim for violation of Plaintiffs' substantive due process rights.[3] The jury returned verdicts against Dean Douglas as to the § 1983 First Amendment claim, and against Johnson as to the § 1981 race discrimination claim. The jury also returned verdicts against both Dean Douglas and Johnson as to Plaintiffs' substantive due process claims. Defendants timely filed a renewed motion for judgment as a matter of law, which was denied by the magistrate judge.[4] The magistrate judge entered final judgment as follows:

1. Harrington was awarded $12,362 in compensatory damages and $27,000 in punitive damages from Dean Douglas, plus $4,301 in compensatory damages and $5,000 in punitive damages from Johnson.

2. Levy was awarded $20,320 in compensatory damages and $27,000 in punitive damages from Dean Douglas, plus $6,201 in compensatory damages and $5,000 in punitive damages from Johnson.

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[3] Prior to trial, the magistrate judge ruled, *inter alia*, that Texas Southern University enjoys Eleventh Amendment immunity from suit as to Plaintiffs' § 1981 race discrimination and § 1983 free speech retaliation claims. The magistrate judge also held that Defendants are not liable in their individual capacities on Plaintiffs' Title VII claim. The parties do not appeal these rulings, hence, we will not address them.

[4] Defendants had previously filed a motion for judgment as a matter of law prior to submission of the issues to the jury, as is required by FED. R. CIV. P. 50. The magistrate judge denied this motion, as well.

3. Kleven was awarded $23,285 in compensatory damages and $27,000 in punitive damages from Dean Douglas, plus $7,501 in compensatory damages and $5,000 in punitive damages from Johnson.

The magistrate judge additionally found. by a preponderance of the evidence, that "Plaintiffs are currently underpaid with respect to certain colleagues with comparable experience and qualifications." The magistrate judge found that "the underpayment is a result of illegal discrimination based on race, retaliation for the exercise of their first amendment rights and the arbitrary and capricious manner in which performance evaluations were made." The court ordered the following injunctive relief: (1) that Harrington's salary for the 1994-95 academic year be raised to $105,382 "in order to bring him into parity with Professor Otis King,"[5] and (2) that the salaries for Levy and Kleven be raised to $102,767 for the 1994-95 academic year to bring them into parity with the salary of Johnson. The magistrate judge awarded attorneys' fees and costs to Plaintiffs.

The Defendants timely filed the instant appeal.

DISCUSSION

On appeal, Defendants challenge the jury's verdict as to Dean Douglas on the § 1983 First Amendment claim; Johnson on the § 1981 race discrimination claim; and both Dean Douglas and Johnson on Plaintiffs' substantive due process claims. We will address each issue in turn.

I. Section 1983 - First Amendment

Defendants first argue that Plaintiffs have not suffered a constitutional deprivation under the First Amendment because Plaintiffs' speech did not involve matters of public concern, nor did Douglas' actions

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[5] Otis King is a professor with seniority status.

constitute an adverse employment decision. For the following reasons, we hold that Plaintiffs have failed to establish a § 1983 claim for free speech retaliation, and we reverse the jury's verdict as to this issue.

Section 1983 provides that any person who, under color of state law, deprives another of "any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." 42 U.S.C. § 1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989). "Thus, an underlying constitutional or statutory violation is a predicate to liability under § 1983." *Id.* In this case, Plaintiffs claim that the free speech provision of the First Amendment provides the underlying constitutional violation.

To establish a § 1983 claim of retaliation for the exercise of free speech, Plaintiffs must prove that: (1) Defendants were acting under color of state law; (2) Plaintiffs' speech activities were protected under the First Amendment; and (3) Plaintiffs' exercise of their protected right was a substantial or motivating factor in Defendants' actions. *Pierce v. Texas Dep't. of Crim. Justice Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L.Ed. 2d 471 (1977). We review *de novo* the legal question of whether Plaintiffs' allegations state a valid claim of retaliation. *Shultea v. Wood*, 27 F.3d 1112, 1118 (5th Cir. 1994).

The parties do not dispute on appeal that Defendant Douglas was acting under color of state law. Therefore, we must ask whether Plaintiffs' speech was protected under the First Amendment. To assert a retaliation claim cognizable under the First Amendment, a public employee must allege facts demonstrating that his speech involved a matter of public concern, *Shultea*, 27 F.3d at 1118, and that he "has

suffered an adverse employment action for exercising [his] right to free speech." *Pierce*, 37 F.3d at 1149.

Assuming, without deciding, that the issues raised by Plaintiffs are matters of public concern, the critical questions are: (1) did Plaintiffs suffer an adverse employment action and, if so, (2) was such adverse employment action taken in retaliation for Plaintiffs' exercise of free speech. For the following reasons, we hold that Plaintiffs have failed to show that they suffered an adverse employment action.

"Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Id.* Many actions which merely have a chilling effect upon protected speech are not actionable. *Id.* Actions such as "decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures," while extremely important to the person who has dedicated his or her life to teaching, do not rise to the level of a constitutional deprivation. *Dorsett v. Bd. of Trustees for State Colleges & Universities*, 940 F.2d 121, 123 (5th Cir. 1991).

On appeal, Plaintiffs argue that they experienced the following adverse employment actions: Douglas evaluated Kleven's law school participation as being "counterproductive" and Douglas perennially discriminated against Plaintiffs when making merit-based salary increase determinations. For the following reasons, we hold that neither of these actions rise to the level of a constitutional deprivation.

First, assuming that Douglas did, in fact, criticize Kleven's participation as being counterproductive, Plaintiffs point to no case law (nor do we find any) which holds that an employer's criticism of an employee, without more, constitutes an actionable adverse employment action. In this case, the evidence is clear that no Plaintiff has been discharged or threatened with discharge; no Plaintiff has been demoted; no Plaintiff has been denied a promotion;

and no Plaintiff suffered a reduction in pay. In fact, all Plaintiffs are tenured professors of law, having achieved the highest rank available at the law school. All Plaintiffs still teach at the law school and all Plaintiffs are among the law school's top earners. Regardless of the arguable merits behind this, or any criticism, mere criticisms do not give rise to a constitutional deprivation for purposes of the First Amendment. Accordingly, Plaintiffs did not suffer an actionable adverse employment action when Douglas criticized Kleven as being counterproductive.

Next, Plaintiffs argue that they experienced an adverse employment action when Douglas failed to award them certain merit pay increases. For the purpose of this analysis, we assume, without deciding, that Plaintiffs actually qualified for a merit pay increase in some amount. The record is undisputed, however, that each plaintiff did in fact receive, during each school year for which free speech retaliation is claimed, a merit pay increase; and that their claim is more precisely stated as "we were not awarded merit pay increases in the same amount as others or in the amount to which we think we were entitled." We find nothing in this record upon which a determination could be made that Douglas was obligated to give the same dollar amount or the same percentage increase to each professor to whom merit pay increases would be awarded; and the variations in the amounts or percentages of merit pay increases which he actually awarded were not significant. If Plaintiffs had received no merit pay increase at all or if the amount of such increase were so small as to be simply a token increase which was out of proportion to the merit pay increases granted to others, we might reach a different conclusion. But under the facts of this case we are persuaded that the merit pay increases actually awarded to Plaintiffs cannot be considered as an adverse employment action. As this Court has previously stated in *Dorsett*, any harm resulting from decisions concerning "pay increases"

does not rise to the level of a constitutional deprivation.[6] *Dorsett*, 940 F.2d at 124. After carefully reviewing the record and the case law, we hold that Plaintiffs' proof of adverse employment action in this case amounts to nothing more than a dispute over the quantum of pay increases. Accordingly, the Plaintiffs have not proved an actionable adverse employment activity.

Having failed to establish a First Amendment violation, Plaintiffs failed to prove a case for a § 1983 claim of retaliation for the exercise of free speech. For these reasons, the magistrate judge erred in failing to grant Defendants' motion for judgment as a matter of law, and the judgment of the magistrate court is reversed as to this issue.

II. Sufficiency of the Evidence

Standard of Review

Defendants next challenge the sufficiency of the evidence as to Plaintiffs' claims that Johnson discriminated against them on the basis of their race in violation of § 1981, and that Johnson and Douglas arbitrarily and

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[6] In *Dorsett*, we stated:

> The continuing retaliatory actions alleged by Dorsett appear to be nothing more than decisions concerning teaching assignments, *pay increases*, administrative matters, and departmental procedures....
>
> In public schools and universities across this nation, interfaculty disputes arise daily over teaching assignments, room assignments, administrative duties, classroom equipment, teacher recognition, and a host of other relatively trivial matters. A federal court is simply not the appropriate forum in which to seek redress for such harms.
>
> We have neither the competency nor the resources to undertake to micro manage the administration of thousands of state educational institutions.

Dorsett, 940 F.2d at 123-24 (emphasis added) (internal citations omitted).

capriciously deprived them of merit pay increases in violation of the Fourteenth Amendment.[7] "A motion for judgment as a matter of law ... in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Hiltgen v. Sumral*, 47 F.3d 695, 699 (5th Cir. 1995). "On review of the district court's denial of such a motion, the appellate court uses the same standard to review the verdict that the district court used in first passing on the motion." *Id.* A jury verdict must be upheld unless "there is no legally sufficient evidentiary basis for a reasonable jury to find" as the jury did. Fed. R. Civ. P. 50(a)(1). "This court has consistently applied this standard to show appropriate deference for the jury's determination." *Hiltgen*, 47 F.3d at 700. "A jury may draw reasonable inferences from the evidence, and those inferences may constitute sufficient proof to support a verdict." *Id.* "On appeal we are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination." *Id.* "Even though we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to re-evaluate credibility of witnesses." *Id.* Within this broad standard of deference, we "must focus on whether a reasonable trier of fact could have concluded as the jury did." *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 709 (1996).

Section 1981 Race Discrimination

Section 1981 provides that all persons in the United States shall have the same contractual rights as white citizens.[8] 42 U.S.C. § 1981(a); *LaPierre v. Benson Nissan,*

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[7] The parties do not dispute on appeal that Defendants properly preserved these issues for appeal by asserting a timely motion for judgment as a matter of law at the close of the case.

[8] In the Civil Rights Act of 1991, enacted November 21, 1991, Congress legislatively reversed the Supreme Court case of *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), which held that section 1981's guarantee

Inc., 86 F.3d 444, 448 n.2 (5th Cir. 1996). "Claims of racial discrimination brought under § 1981 are governed by the same evidentiary framework applicable to claims of employment discrimination brought under Title VII." *LaPierre*, 86 F.3d at 448 n.2. Thus, "to succeed on a claim of intentional discrimination under Title VII ... or Section 1981, a plaintiff must first prove a prima facie case of discrimination." *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996). However, "when a case has been tried on the merits, a reviewing appellate court need not address the sufficiency of plaintiff's prima facie case, and may instead proceed directly to the ultimate question of whether plaintiff has produced sufficient evidence for a jury to find that discrimination has occurred." *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 122 (5th Cir. 1992). In other words, the focus "then shifts to the ultimate question of whether the defendant intentionally discriminated against the plaintiff." *LaPierre*, 86 F.3d at 448.

In showing intentional employment discrimination, a plaintiff need not come forward with direct evidence of discriminatory intent. *LaPierre*, 86 F.3d at 449; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc). Direct evidence of an employer's discriminatory intent is rare; therefore, plaintiffs must ordinarily prove their claims through circumstantial evidence. *Id.* A plaintiff may establish circumstantial evidence of intentional discrimination by demonstrating that a defendant's articulated nondiscriminatory rationale was pretextual. *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817, 1825 (1973); *Texas Dept. of Community Affairs v. Burdine*, 101

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of the right to make contracts did not extend to conduct occurring after the employer-employee contract was formed. Section 1981 now specifically states that, "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b); *National Ass'n. of Gov't Employees, Et Al. v. City Public Serv. Bd. of San Antonio, Et Al.*, 40 F.3d 698, 712 (5th Cir. 1994).

S. Ct. 1089, 1093 (1981). A plaintiff may demonstrate pretext either by showing that a discriminatory motive more likely motivated the employer, or that the employer's explanation is unworthy of credence. *Amburgey v. Corhart Refractories Corp. Inc.*, 936 F.2d 805, 813 (5th Cir. 1991).

At trial, Plaintiffs offered evidence showing that Johnson intentionally or recklessly failed to give white professors equal credit and consideration for their scholarship, research, community service, and publications. Plaintiffs offered evidence showing that this discriminatory policy caused black professors to receive higher merit pay increases than those received by their white counterparts. Plaintiffs also offered the testimony of faculty members who stated that a racially discriminatory environment existed at the law school and that Johnson's treatment of the Plaintiffs could only be attributed to such discrimination.

After thoroughly reviewing the relevant portions of the record, as well as the arguments of the parties, we hold that Plaintiffs offered sufficient evidence to allow a reasonable jury to conclude that Johnson intentionally discriminated against Plaintiffs on the basis of race when he evaluated them for merit pay increases. While the evidence offered by Plaintiffs is purely circumstantial, such evidence, if believed by the jury, can give rise to a claim for intentional race discrimination under § 1981. For these reasons, we find no reversible error and the judgment of the magistrate judge on this issue is affirmed.

Substantive Due Process

Finally, Defendants argue that the evidence presented at trial does not support the jury's finding that Johnson and Douglas violated Defendants' substantive due process rights under the Fourteenth Amendment. "To succeed with a claim based on substantive due process in the public employment context, the plaintiff must show two things: (1) that he had a property interest/right in his employment, and (2) that the public employer's termination

of that interest was arbitrary or capricious." *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993). "If state action is so arbitrary and capricious as to be irrational, its infringement on a constitutionally protected interest may violate substantive due process rights." *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 558 (5th Cir. 1988).

On appeal, Defendants do not dispute that Plaintiffs had a property interest in a rational application of the university's merit pay policy. Accordingly, we need not address this issue. Assuming, arguendo, that Plaintiffs did have a property interest in merit pay increases, we must ask whether Johnson and Douglas awarded such pay increases in an arbitrary and capricious manner. *See Spuler v. Pickar*, 958 F.2d 103, 107 (5th Cir. 1992) (Assuming plaintiff had a property interest, the only substantive process due was the exercise of professional judgment, in a non-arbitrary and non-capricious fashion). After thoroughly and carefully reviewing the briefs of the parties and the relevant portions of the record, we hold that a jury could reasonably conclude that Johnson and Douglas acted in an arbitrary and capricious manner in their merit pay evaluations. Thus, the judgment of the magistrate judge as to this issue is affirmed.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the magistrate judge as to the issue of § 1983 retaliatory discharge under the First Amendment; affirm the judgment of the magistrate judge as to the issue of § 1981 race discrimination; and affirm the judgment of the magistrate judge as to the issue of substantive due process under the Fourteenth Amendment. To the extent that the final

judgment of the magistrate judge is not modified by this order, it is, in all things, affirmed.[9]

This case is remanded to the magistrate judge for modification of the final judgment in accordance with this opinion.

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[9] Defendants have not appealed the propriety of the injunctive relief awarded by the magistrate judge, or the punitive damages awarded by the jury on the issue of race discrimination. Accordingly, we express no opinion as to these aspects of the judgment. The issue of attorneys' fees shall be determined by the magistrate judge in a manner consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-20751

EUGENE M. HARRINGTON; MARTIN LEVY;
THOMAS KLEVEN,

Plaintiffs-Appellees,

VERSUS

WILLIAM H. HARRIS, ET AL.,

Defendants,

JAMES M. DOUGLAS; CALIPH JOHNSON;
TEXAS SOUTHERN UNIVERSITY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

OPINION

Before REYNALDO G. GARZA, DeMOSS, and PARKER, Circuit Judges.

DeMOSS, Circuit Judge:

In this proceeding tried by consent before a magistrate judge, the jury found that three white law school professors, Plaintiffs Eugene M. Harrington, Martin Levy, and Thomas Kleven, of state-supported Texas Southern University's Thurgood Marshall School of Law in Houston, Texas, had been discriminated against by the law school's dean, Defendant James M. Douglas, on the basis of protected speech, and by the school's associate dean, Defendant Caliph Johnson, on the basis of their race. The jury also found that Defendants Douglas and Johnson violated Plaintiffs' substantive due process rights. The jury awarded compensatory and punitive damages and judgment was entered. Holding that judgment as a matter of law should have been entered against Plaintiffs' as to their claims under § 1983 for First Amendment free speech retaliation, we reverse as to that issue, but affirm as to the issues of § 1981 race discrimination and Fourteenth Amendment substantive due process.

BACKGROUND

Appellees/Plaintiffs Eugene M. Harrington ("Harrington"), Martin Levy ("Levy"), and Thomas Kleven ("Kleven") are tenured faculty members of the Texas Southern University Thurgood Marshall School of Law ("the law school") in Houston, Texas. They have been on the law school's faculty since 1966, 1972, and 1974, respectively. The parties do not dispute that the law school

is a public university with a historically black majority enrollment.

In 1981, Appellant/Defendant James Douglas ("Douglas") was named dean of the law school. Appellant/Defendant Caliph Johnson ("Johnson") had been on the law school faculty since 1975 and served as associate dean from 1990 to 1992.

During Douglas' first semester as dean, Harrington and Levy approached Douglas concerning a Student Bar Association ("SBA") recommendation to appoint only black students to representative positions on various law school committees. Harrington and Levy believed that non-black student representation was important and they solicited Douglas to disregard the SBA recommendation and appoint non-black students.[1] It is unclear how Douglas reacted to their suggestions. Ultimately, the university president and a Texas state senator became involved and non-black students were subsequently appointed to the committees. Levy claims that the following year he received the lowest salary recommendation of any member on the faculty.

In May 1983, thirteen law school professors, including Levy and Kleven, signed a document entitled, "Bill of Particulars." In this document, the signatories complained that Dean Douglas discriminated against certain professors as to salaries, that he failed to adhere to law school policies, and that he mishandled various administrative duties. The Bill of Particulars addressed:

> the professors' concerns regarding American Bar Association (ABA) mandates, extreme insensitivity to the role of the Chicano students in the Law School, unilateral reduction of courses resulting in harm to students, reversing a long-standing

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[1] The law school constitution allowed the Dean to appoint faculty representatives to the law school committees. Student representatives were chosen by the SBA.

> policy on Senior Priority exams, unilateral increase in enrollment at the Law School, and such administrative matters as jeopardizing the status of the Law School by failing to develop a plan for the clinical program, and failing to properly certify Law School graduates for the July 1982 Bar exam.

This Bill of Particulars also addressed the signatories' concern that certain professors had received arbitrary or unfair performance evaluations or salary increases. Appellee Harrington did not sign this document.

One month later, another letter was sent to Douglas, further detailing the professors' concerns. Douglas sent no written response. In July 1983, eight faculty members, including Levy and Kleven, wrote to the university's Vice-President for Academic Affairs requesting that the university dismiss Douglas as dean of the law school. Harrington did not sign this letter.

In early 1984, eighteen of the twenty-three full-time members of the law school faculty, including Harrington, Levy, and Kleven, participated in a vote of "confidence/no confidence" concerning Douglas. Twelve members of the faculty voted "no confidence" and six members abstained.

Approximately six months later, fifteen members of the law school faculty, including all three Plaintiffs, wrote a letter to the president of the university requesting that Douglas be removed as dean. The university president denied their request.

Several months later, eight members of the law school faculty wrote a letter to the President of the American Bar Association complaining that the university's refusal to remove Douglas violated ABA guidelines. Following an investigation, the ABA dismissed the complaint.

Beginning in 1985, Levy and Kleven, along with several of their black colleagues, complained to both the university president and vice-president about discriminatory treatment in their salaries. In 1986, then vice-president William Moore allegedly made salary adjustments for some of the professors, including Levy and Kleven; however, Plaintiffs contend that they never received these salary increases.

In 1988-89, Levy and Kleven again complained to the university vice-president about unfair treatment in salaries and raises, and were subsequently "awarded a partial adjustment for that year."

In 1990, Levy and Kleven complained to then university vice-president Bobby Wilson about Dean Douglas' unfair treatment regarding their salaries and raises. Levy subsequently received a salary adjustment.

Later in 1990, vice-president Wilson developed a comprehensive merit evaluation system.[2] The merit evaluation system required the individual faculty members to evaluate themselves on a point basis, and then submit their self-evaluations to another appointed faculty member for further review. Johnson, as associate dean of the law school, was chosen to assess law school faculty's self-evaluations and recommend overall point totals to the dean. The merit evaluations performed by Johnson formed the basis for the salary increases to be awarded by Dean Douglas.

Plaintiffs state that Johnson failed to notify Harrington about the newly implemented self-evaluation form, even though Johnson allegedly knew that Harrington was on sabbatical when the form was adopted. Harrington never submitted a self-evaluation form for the 1990-91 academic year. His failure to do so was considered when salary increase determinations were made.

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[2] Prior to the implementation of this system, the university did not have a uniform faculty evaluation system.

Plaintiffs state that, for the 1990-91 academic year, "Johnson also lowered the points requested for all the white professors...and raised the points requested for every Black professor who used the identical form."

In 1991-92, Harrington was awarded "professor of the year" by all three student bar associations on campus. This same year, Harrington was allegedly awarded the lowest percentage salary increase of all full professors - 1%.

In 1991-92, Kleven received the "outstanding teacher of the year award" from Texas Southern University and was asked to be a speaker at the law school graduation. This same year, Johnson allegedly lowered Kleven's self-evaluation points because of insufficient scholarship. Johnson, however, admitted to never having read the scholarly work of Kleven.

Plaintiffs alleged that, by 1993, the disparity in salaries between the average white full professors and average African American full professors had grown to approximately $3,000 per year even though, on average, the white professors had allegedly eight years more longevity than the African American professors. Plaintiffs allege that Harrington, who had been a professor longer than any other, was ranked seventh in salary; Levy, who ranked third in years, ranked ninth in salary; and Kleven, who tied Dean Douglas in years as a professor, ranked tenth in salary.

At the time of trial, Harrington's nine month salary was $102,046, Levy's nine month salary was $98,297, and Kleven's nine month salary was $97,332. Harrington, Levy, and Kleven were among the ten highest paid faculty at the law school.

After filing a complaint with the Equal Employment Opportunity Commission in 1993, Plaintiffs brought suit in federal court alleging violations of their due process rights under the Fifth and Fourteenth Amendments to the Constitution; violations of their civil rights under the Civil Rights Act of 1871, 42 U.S.C. § 1983; conspiracy to interfere with their civil rights under the Klu Klux Klan Act,

42 U.S.C. § 1985; racial discrimination in violation of equal protection under the Civil Rights Act of 1966, 42 U.S.C. § 1981; and violation of their right to free expression under the First, Fifth, and Fourteenth Amendments to the Constitution, as well as pendent state claims for breach of contract and intentional infliction of emotional distress.

At trial, the following issues were submitted to the jury: a § 1983 claim for retaliation in violation of Plaintiffs' right to free expression under the First Amendment; claims under § 1981 and Title VII for race discrimination; and a claim for violation of Plaintiffs' substantive due process rights.[3] The jury returned verdicts against Dean Douglas as to the § 1983 First Amendment claim, and against Johnson as to the § 1981 race discrimination claim. The jury also returned verdicts against both Dean Douglas and Johnson as to Plaintiffs' substantive due process claims. Defendants timely filed a renewed motion for judgment as a matter of law, which was denied by the magistrate judge.[4] The magistrate judge entered final judgment as follows:

1. Harrington was awarded $12,362 in compensatory damages and $27,000 in punitive damages from Dean Douglas, plus $4,301 in compensatory damages and $5,000 in punitive damages from Johnson.

2. Levy was awarded $20,320 in compensatory damages and $27,000 in punitive damages from Dean Douglas, plus $6,201 in compensatory damages and $5,000 in punitive damages from Johnson.

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[3] Prior to trial, the magistrate judge ruled, *inter alia*, that Texas Southern University enjoys Eleventh Amendment immunity from suit as to Plaintiffs' § 1981 race discrimination and § 1983 free speech retaliation claims. The magistrate judge also held that Defendants are not liable in their individual capacities on Plaintiffs' Title VII claim. The parties do not appeal these rulings, hence, we will not address them.

[4] Defendants had previously filed a motion for judgment as a matter of law prior to submission of the issues to the jury, as is required by FED. R. CIV. P. 50. The magistrate judge denied this motion, as well.

3. Kleven was awarded $23,285 in compensatory damages and $27,000 in punitive damages from Dean Douglas, plus $7,501 in compensatory damages and $5,000 in punitive damages from Johnson.

The magistrate judge additionally found, by a preponderance of the evidence, that "Plaintiffs are currently underpaid with respect to certain colleagues with comparable experience and qualifications." The magistrate judge found that "the underpayment is a result of illegal discrimination based on race, retaliation for the exercise of their first amendment rights and the arbitrary and capricious manner in which performance evaluations were made." The court ordered the following injunctive relief: (1) that Harrington's salary for the 1994-95 academic year be raised to $105,382 "in order to bring him into parity with Professor Otis King,"[5] and (2) that the salaries for Levy and Kleven be raised to $102,767 for the 1994-95 academic year to bring them into parity with the salary of Johnson. The magistrate judge awarded attorneys' fees and costs to Plaintiffs.

The Defendants timely filed the instant appeal.

DISCUSSION

On appeal, Defendants challenge the jury's verdict as to Dean Douglas on the § 1983 First Amendment claim; Johnson on the § 1981 race discrimination claim; and both Dean Douglas and Johnson on Plaintiffs' substantive due process claims. We will address each issue in turn.

I. Section 1983 - First Amendment

Defendants first argue that Plaintiffs have not suffered a constitutional deprivation under the First Amendment because Plaintiffs' speech did not involve

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[5] Otis King is a professor with seniority status.

matters of public concern, nor did Douglas' actions constitute an adverse employment decision. For the following reasons, we hold that Plaintiffs have failed to establish a § 1983 claim for free speech retaliation, and we reverse the jury's verdict as to this issue.

Section 1983 provides that any person who, under color of state law, deprives another of "any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...." 42 U.S.C. § 1983. "Rather than creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989). "Thus, an underlying constitutional or statutory violation is a predicate to liability under § 1983." *Id.* In this case, Plaintiffs claim that the free speech provision of the First Amendment provides the underlying constitutional violation.

To establish a § 1983 claim of retaliation for the exercise of free speech, Plaintiffs must prove that: (1) Defendants were acting under color of state law; (2) Plaintiffs' speech activities were protected under the First Amendment; and (3) Plaintiffs' exercise of their protected right was a substantial or motivating factor in Defendants' actions. *Pierce v. Texas Dep't. of Crim. Justice Inst. Div.*, 37 F.3d 1146, 1149 (5th Cir. 1994); *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L.Ed. 2d 471 (1977). We review *de novo* the legal question of whether Plaintiffs' allegations state a valid claim of retaliation. *Shultea v. Wood*, 27 F.3d 1112, 1118 (5th Cir. 1994).

The parties do not dispute on appeal that Defendant Douglas was acting under color of state law. Therefore, we must ask whether Plaintiffs' speech was protected under the First Amendment. To assert a retaliation claim cognizable under the First Amendment, a public employee must allege facts demonstrating that his speech involved a matter of

public concern, *Shultea*, 27 F.3d at 1118, and that he "has suffered an adverse employment action for exercising [his] right to free speech." *Pierce*, 37 F.3d at 1149.

Assuming, without deciding, that the issues raised by Plaintiffs are matters of public concern, the critical questions are: (1) did Plaintiffs suffer an adverse employment action and, if so, (2) was such adverse employment action taken in retaliation for Plaintiffs' exercise of free speech. For the following reasons, we hold that Plaintiffs have failed to show that they suffered an adverse employment action.

"Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Id.* Many actions which merely have a chilling effect upon protected speech are not actionable. *Id.* Actions such as "decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures," while extremely important to the person who has dedicated his or her life to teaching, do not rise to the level of a constitutional deprivation. *Dorsett v. Bd. of Trustees for State Colleges & Universities*, 940 F.2d 121, 123 (5th Cir. 1991).

On appeal, Plaintiffs argue that they experienced the following adverse employment actions: Douglas evaluated Kleven's law school participation as being "counterproductive" and Douglas perennially discriminated against Plaintiffs when making merit-based salary increase determinations. For the following reasons, we hold that neither of these actions rise to the level of a constitutional deprivation.

First, assuming that Douglas did, in fact, criticize Kleven's participation as being counterproductive, Plaintiffs point to no case law (nor do we find any) which holds that an employer's criticism of an employee, without more, constitutes an actionable adverse employment action. In this case, the evidence is clear that no Plaintiff has been discharged or threatened with discharge; no Plaintiff has

been demoted; no Plaintiff has been denied a promotion; and no Plaintiff suffered a reduction in pay. In fact, all Plaintiffs are tenured professors of law, having achieved the highest rank available at the law school. All Plaintiffs still teach at the law school and all Plaintiffs are among the law school's top earners. Regardless of the arguable merits behind this, or any criticism, mere criticisms do not give rise to a constitutional deprivation for purposes of the First Amendment. Accordingly, Plaintiffs did not suffer an actionable adverse employment action when Douglas criticized Kleven as being counterproductive.

Next, Plaintiffs argue that they experienced an adverse employment action when Douglas failed to award them certain merit pay increases. For purposes of this analysis, we assume that Plaintiffs actually deserved the merit pay increases of which they complain. The question before us, therefore, is whether the denial of deserved merit pay increases can constitute an adverse employment action. We conclude that it cannot. As this Court has previously stated in *Dorsett*, any harm resulting from decisions concerning "pay increases" does not rise to the level of a constitutional deprivation.[6] *Dorsett*, 940 F.2d at 124. After

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[6] In *Dorsett*, we stated:

> The continuing retaliatory actions alleged by Dorsett appear to be nothing more than decisions concerning teaching assignments, *pay increases*, administrative matters, and departmental procedures....
>
> In public schools and universities across this nation, interfaculty disputes arise daily over teaching assignments, room assignments, administrative duties, classroom equipment, teacher recognition, and a host of other relatively trivial matters. A federal court is simply not the appropriate forum in which to seek redress for such harms.
>
> We have neither the competency nor the resources to undertake to micro manage the administration of thousands of state educational institutions.

carefully reviewing the record and the case law, we hold that Plaintiffs' proof of adverse employment action amounts to nothing more than a dispute over pay increases. Accordingly, the Plaintiffs have not proved an actionable adverse employment activity.

Having failed to establish a First Amendment violation, Plaintiffs failed to prove a case for a § 1983 claim of retaliation for the exercise of free speech. For these reasons, the magistrate judge erred in failing to grant Defendants' motion for judgment as a matter of law, and the judgment of the magistrate court is reversed as to this issue.

II. Sufficiency of the Evidence

Standard of Review

Defendants next challenge the sufficiency of the evidence as to Plaintiffs' claims that Johnson discriminated against them on the basis of their race in violation of § 1981, and that Johnson and Douglas arbitrarily and capriciously deprived them of merit pay increases in violation of the Fourteenth Amendment.[7] "A motion for judgment as a matter of law ... in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict." *Hiltgen v. Sumral*, 47 F.3d 695, 699 (5th Cir. 1995). "On review of the district court's denial of such a motion, the appellate court uses the same standard to review the verdict that the district court used in first passing on the motion." *Id.* A jury verdict must be upheld unless "there is no legally sufficient evidentiary basis for a reasonable jury to find" as the jury did. FED. R. CIV. P. 50(a)(1). "This court has consistently applied this standard

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Dorsett, 940 F.2d at 123-24 (emphasis added) (internal citations omitted).

[7] The parties do not dispute on appeal that Defendants properly preserved these issues for appeal by asserting a timely motion for judgment as a matter of law at the close of the case.

to show appropriate deference for the jury's determination." *Hiltgen*, 47 F.3d at 700. "A jury may draw reasonable inferences from the evidence, and those inferences may constitute sufficient proof to support a verdict." *Id.* "On appeal we are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination." *Id.* "Even though we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to re-evaluate credibility of witnesses." *Id.* Within this broad standard of deference, we "must focus on whether a reasonable trier of fact could have concluded as the jury did." *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 149 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 709 (1996).

Section 1981 Race Discrimination

Section 1981 provides that all persons in the United States shall have the same contractual rights as white citizens.[8] 42 U.S.C. § 1981(a); *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 448 n.2 (5th Cir. 1996). "Claims of racial discrimination brought under § 1981 are governed by the same evidentiary framework applicable to claims of employment discrimination brought under Title VII." *LaPierre*, 86 F.3d at 448 n.2. Thus, "to succeed on a claim of intentional discrimination under Title VII ... or Section 1981, a plaintiff must first prove a prima facie case of discrimination." *Wallace v. Texas Tech Univ.*, 80 F.3d

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[8] In the Civil Rights Act of 1991, enacted November 21, 1991, Congress legislatively reversed the Supreme Court case of *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), which held that section 1981's guarantee of the right to make contracts did not extend to conduct occurring after the employer-employee contract was formed. Section 1981 now specifically states that, "[f]or purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b); *National Ass'n. of Gov't Employees, Et Al. v. City Public Serv. Bd. of San Antonio, Et Al.*, 40 F.3d 698, 712 (5th Cir. 1994).

1042, 1047 (5th Cir. 1996). However, "when a case has been tried on the merits, a reviewing appellate court need not address the sufficiency of plaintiff's prima facie case, and may instead proceed directly to the ultimate question of whether plaintiff has produced sufficient evidence for a jury to find that discrimination has occurred." *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 122 (5th Cir. 1992). In other words, the focus "then shifts to the ultimate question of whether the defendant intentionally discriminated against the plaintiff." *LaPierre*, 86 F.3d at 448.

In showing intentional employment discrimination, a plaintiff need not come forward with direct evidence of discriminatory intent. *LaPierre*, 86 F.3d at 449; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993 (5th Cir. 1996) (en banc). Direct evidence of an employer's discriminatory intent is rare; therefore, plaintiffs must ordinarily prove their claims through circumstantial evidence. *Id.* A plaintiff may establish circumstantial evidence of intentional discrimination by demonstrating that a defendant's articulated nondiscriminatory rationale was pretextual. *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817, 1825 (1973); *Texas Dept. of Community Affairs v. Burdine*, 101 S. Ct. 1089, 1093 (1981). A plaintiff may demonstrate pretext either by showing that a discriminatory motive more likely motivated the employer, or that the employer's explanation is unworthy of credence. *Amburgey v. Corhart Refractories Corp. Inc.*, 936 F.2d 805, 813 (5th Cir. 1991).

At trial, Plaintiffs offered evidence showing that Johnson intentionally or recklessly failed to give white professors equal credit and consideration for their scholarship, research, community service, and publications. Plaintiffs offered evidence showing that this discriminatory policy caused black professors to receive higher merit pay increases than those received by their white counterparts. Plaintiffs also offered the testimony of faculty members who stated that a racially discriminatory environment existed at

the law school and that Johnson's treatment of the Plaintiffs could only be attributed to such discrimination.

After thoroughly reviewing the relevant portions of the record, as well as the arguments of the parties, we hold that Plaintiffs offered sufficient evidence to allow a reasonable jury to conclude that Johnson intentionally discriminated against Plaintiffs on the basis of race when he evaluated them for merit pay increases. While the evidence offered by Plaintiffs is purely circumstantial, such evidence, if believed by the jury, can give rise to a claim for intentional race discrimination under § 1981. For these reasons, we find no reversible error and the judgment of the magistrate judge on this issue is affirmed.

Substantive Due Process

Finally, Defendants argue that the evidence presented at trial does not support the jury's finding that Johnson and Douglas violated Defendants' substantive due process rights under the Fourteenth Amendment. "To succeed with a claim based on substantive due process in the public employment context, the plaintiff must show two things: (1) that he had a property interest/right in his employment, and (2) that the public employer's termination of that interest was arbitrary or capricious." *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993). "If state action is so arbitrary and capricious as to be irrational, its infringement on a constitutionally protected interest may violate substantive due process rights." *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 558 (5th Cir. 1988).

On appeal, Defendants do not dispute that Plaintiffs had a property interest in a rational application of the university's merit pay policy. Accordingly, we need not address this issue. Assuming, arguendo, that Plaintiffs did have a property interest in merit pay increases, we must ask whether Johnson and Douglas awarded such pay increases in an arbitrary and capricious manner. *See Spuler v.*

Pickar, 958 F.2d 103, 107 (5th Cir. 1992) (Assuming plaintiff had a property interest, the only substantive process due was the exercise of professional judgment, in a non-arbitrary and non-capricious fashion). After thoroughly and carefully reviewing the briefs of the parties and the relevant portions of the record, we hold that a jury could reasonably conclude that Johnson and Douglas acted in an arbitrary and capricious manner in their merit pay evaluations. Thus, the judgment of the magistrate judge as to this issue is affirmed.

CONCLUSION

For the foregoing reasons, we reverse the judgment of the magistrate judge as to the issue of § 1983 retaliatory discharge under the First Amendment; affirm the judgment of the magistrate judge as to the issue of § 1981 race discrimination; and affirm the judgment of the magistrate judge as to the issue of substantive due process under the Fourteenth Amendment. To the extent that the final judgment of the magistrate judge is not modified by this order, it is, in all things, affirmed.[9]

This case is remanded to the magistrate judge for modification of the final judgment in accordance with this opinion.

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[9] Defendants have not appealed the propriety of the injunctive relief awarded by the magistrate judge, or the punitive damages awarded by the jury on the issue of race discrimination. Accordingly, we express no opinion as to these aspects of the judgment. The issue of attorneys' fees shall be determined by the magistrate judge in a manner consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

EUGENE HARRINGTON,	§
MARTIN LEVY, and	§
THOMAS KLEVEN,	§
	§
Plaintiffs,	§
	§
	§
C.A. No. 93-2637	§
	§
WILLIAM H. HARRIS,	§
BOBBY WILSON, JAMES M.	§
DOUGLAS, CALIPH JOHNSON and	§
TEXAS SOUTHERN UNIVERSITY	§

FINAL JUDGMENT

In accordance with the jury verdict of January 20, 1995, the court hereby awards judgment in the following respects:

1. Eugene Harrington is awarded $12,362 in compensatory damages and $27,000 in punitive damages from James M. Douglas.

2. Eugene Harrington is awarded $4,301 in compensatory damages and $5,000 in punitive damages from Caliph Johnson.

3. Martin Levy is awarded $20,320 in compensatory damages and $27,000 in punitive damages from James M. Douglas.

4. Martin Levy is awarded $6,201 in compensatory damages and $5,000 in punitive damages from Caliph Johnson.

5. Thomas Kleven is awarded $23,185 in compensatory damages and $27,000 in punitive damages from James M. Douglas.

6. Thomas Kleven is awarded $7,501 in compensatory damages and $5,000 in punitive damages from Caliph Johnson.

Based on the evidence adduced at trial, the court finds by a preponderance of the evidence that Plaintiffs are currently underpaid with respect to certain colleagues with comparable experience and qualifications. The court finds that the underpayment is a result of illegal discrimination based on race, retaliation for the exercise of their first amendment rights and the arbitrary and capricious manner in which performance evaluations were made. For this reason, as equitable relief, the court orders the following:

Plaintiff Eugene Harrington's salary for the 1994-95 academic year shall be raised to $105,382 in order to bring him into parity with Professor Otis King. The salaries for Plaintiffs Martin Levy and Thomas Kleven shall be raised to $102,767.00 for the 1994-95 academic year to bring them into parity with the salary of Defendant Caliph Johnson.

The court declines to enter prospective injunctive relief against Texas Southern University, Dean James M. Douglas and Caliph Johnson, other than the relief set forth above, as Plaintiffs have an adequate remedy at law for illegal retaliation and/or discrimination in the future.

Plaintiffs shall take nothing against Defendant Bobby Wilson.

Further, in accordance with the order awarding attorneys' fees, Defendants James M. Douglas and Caliph Johnson shall pay attorneys' fees in the amount of $163,765.55 and expenses in the amount of $10,036.93 to Plaintiffs.

Plaintiffs are entitled to prejudgment interest at the rate of 10 per cent per annum, compounded daily, pursuant to the authority of Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985). Because the facts of this

action proved a continuing course of discrimination which pre-dated the limitations period of two years, and because damages were awarded for the 1991-92 academic year to the present, the court finds that prejudgment interest first accrues on March 1, 1992, six months after the beginning of the 1991-92 academic year.

Post judgment interest shall accrue at the rate of 7.03%, compounded annually, from the date of judgment, until paid.

This is a FINAL JUDGMENT.

DONE at Houston, Texas, this 2nd day of March, 1995.

/S/_____
NANCY K. JOHNSON
UNITED STATES MAGISTRATE JUDGE